Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF WILTEL COMMUNICATIONS, LLC

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SUMMARY

The Commission's pricing flexibility mechanisms for special access were implemented in anticipation that the rapid increase in market entry that characterized the late 1990s would continue into the foreseeable future. The Commission (and many participants in the industry) expected that competition would develop in the special access market that would reduce the ILECs' market power and lead to lower prices, higher quality, and competitive options for purchasers of special access.

Six years later, the much-anticipated competition in the special access market has not developed. Special access remains an ILEC monopoly. Despite the ILECs' claims of widespread competition, the evidence shows that most carriers and customers have few alternatives to the ILECs for the overwhelming majority of their special access requirements. Competitive wireline facilities do not exist on most routes and to most buildings, and such facilities are unlikely to be built. Even where such facilities do exist, the competitive process has been thwarted because the ILECs have been allowed to avoid real price competition by imposing anticompetitive contractual terms and conditions that effectively prevent customers from using alternative local carriers. The imposition of pricing plans that force customers to bind their current services to the ILEC, the lack of competitive network coverage by competing providers, and the difficulties in obtaining support for Type II service have led to a situation in which ILECs are able to successfully charge a substantial premium above the price offered by CLECs.

The ILECs' continuing monopoly in the special access market is further evidenced by the continuing high prices and high margins for special access services. Unlike prices for long-haul facilities, which have decreased substantially in the face of competition, special access prices have remained the same or, at best, decreased slightly. In fact, prices in areas where pricing

flexibility has been granted have either decreased minimally or have, in many cases, increased. True competition would have forced the ILECs to reduce their prices for special access. Their ability to maintain above-market prices, despite the decrease in their costs, demonstrates their market power.

Finally, the approval of all the RBOCs' 271 applications, soon followed by the acquisition of the two largest IXCs by the two largest ILECs, magnifies the importance of reducing special access prices to cost. In 1999, if IXCs overpaid for special access, at least they all overpaid equally, so their competitive success was not predicated on undue access cost differentials. However, in a world in which the two largest ILECs own the two largest IXCs, overcharges for special access fundamentally undermine long-haul competition: whether post-merger AT&T overpays SBC for special access is irrelevant to AT&T, because the money comes out of one pocket of the corporate parent's trousers and goes back into the other pocket. For the same reason it is irrelevant if MCI overpays Verizon for special access; the corporate parent recoups the overcharge. But when independent IXCs such as WilTel overpay for special access, the overpayment is a direct subsidy from competitors to the new "SuperBOC," and there is no recoupment. Thus, the failure of the market to drive prices to incremental cost for special access is not only result of a failed effort at making the local market competitive, this failure--absent decisive action by the Commission—will subvert competition in long-distance as well. Allowing ILECs to overcharge for special access will upset the competitive balance in the long-distance market in a way that could not have been anticipated in 1999.

The Commission must take the opportunity presented by this proceeding to address the reality of the special access market as it is today, not the reality that was expected in 1999. The Commission should reject the ILECs' "evidence" of competition and their calls for additional

pricing flexibility. Instead, the Commission should revise its pricing flexibility rules as described herein and in WilTel's initial comments in this proceeding to ensure that competitive carriers and customers can obtain cost-based access to the special access facilities upon which their ability to operate depends. Prompt and forceful Commission action is especially important in light of the proposed mergers of AT&T with SBC and MCI with Verizon, which are likely to limit further the availability of competitive special access services and otherwise disrupt the special access market.

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REPLY COMMENTS OF WILTEL COMMUNICATIONS, LLC

WilTel Communications, LLC ("WilTel") files these Reply Comments to urge the Federal Communications Commission ("FCC" or "Commission") to reform the Commission's rules for pricing of interstate special access services provided by incumbent local exchange carriers ("ILECs") subject to price cap regulation.[1]

I. THE SPECIAL ACCESS MARKET REMAINS AN RBOC MONOPOLY

When the Commission established its pricing flexibility mechanism for interstate special access, it did so with the expectation that local competition would develop sufficiently to discipline the behavior of price cap ILECs, lead to lower prices and better quality for special access services, and reduce the need for regulation.[2] That optimistic view has not become reality. Rather, the ILECs have strengthened their grip on the special access market and are able to charge above-cost rates and impose anticompetitive terms and conditions with respect to their

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[1] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, FCC 05-18, released January 31, 2005 ("*NPRM*").

[2] *NPRM*, at ¶ 18; *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 98-63, 98-157, Fifth Report and Order, 14 FCC Rcd 14221, at ¶ 144 (1999).

sales of special access services. So tight is this grip that they are able to retain their market share despite charging rates that substantially exceed those offered by other providers. In short, special access remains largely an ILEC monopoly.

ILEC special access has remained impervious to competitive threat for several reasons. First, the ILECs retain a huge first-mover advantage in the special access market. Special access/transport is characterized by significant economies of traffic density and utilization up to the OC192 transport level, and there are very few individual locations or even traffic aggregating competitive access providers ("CAPs") that can fully utilize such capacity in a local market. In other words, for the vast majority of building locations, the last-mile transmission is typified by economies of traffic density across the entire range of potential demand. This is the textbook definition of "natural monopoly."

In addition, the ILEC possesses a unique relationship with the owners of multi-tenant office buildings, derived from the decades in which it was the monopoly or near-monopoly carrier. In virtually every commercial building in which there is a market for special access, ILECs own or control pre-existing facilities for provisioning of special access services. In contrast, a new entrant carrier must obtain the right to enter the building, obtain space to locate transmission and terminating equipment and install backup power, and may also need to complete special construction before service can be introduced. Then, to reach its customers' premises, a new entrant must arrange connection to the building's existing inside wiring, often by applying to its competitor, the ILEC, or it must install its own cabling, a costly effort that may require a separate license from the building owner and construction of new conduits and risers. Special access customers may understand the benefit of having competition among service providers, but that benefit is only one of many factors they consider in selecting their office

locations, so landlords have the flexibility to demand financial consideration from any second carrier wanting to serve the building, as long as the incumbent's special access service is already available to satisfy tenants' demands. Therefore, while new entrants may have to make significant payments to property owners, incumbents seldom are required to make such payments. Accordingly, even where the ILEC charges prices that substantially exceed its costs, competitive entry remains difficult.

Second, it is simply not practical or economical to maintain dozens or hundreds or thousands of different business relationships with CAPs, each with a small list of on-net sites, in order to obtain access to tens of thousands of potential customer locations. In order to turn up a new vendor WilTel must: establish an interconnection facility with that vendor (which will be inefficient unless a substantial amount of business is transacted); obtain and maintain that vendor's "on-net" location and pricing in its systems; maintain an ongoing relationship with that vendor for provisioning, monitoring and maintenance of special access facilities; adapt to that vendor's unique ordering, provisioning and billing processes; and negotiate contractual terms that allow WilTel to maintain its SLAs and service quality with respect to its own end user customers. Thus, any efficient alternatives to ILEC special access would come from larger providers that cover broad geographic areas. Unfortunately, however, the special access market displays virtually no examples of firms possessing such scope beyond the RBOCs, and the two CAPs that have come closest to achieving this breadth of service—MCI and AT&T—are about to be subsumed by RBOC mergers. WilTel's data reveal that, taken together, MCI and AT&T uniquely serve approximately 10,500 unique building locations or nearly half of all building addresses served by competitive access providers. Thus, their potential exit from the CAP market would substantially diminish the already-scant rivalry that does exist. To place the importance

of the service provided by the remaining CAPs in perspective, it is worth considering that in a declaration in support of AT&T's merger with SBC, Professors Carlton & Sider state that "AT&T's local access facilities serve a very modest number of buildings in SBC's region. . . . AT&T serves . . . roughly 0.4 percent of the commercial buildings with more than 10 voice line-equivalents in SBC's region."[3] This suggests that the CAPs remaining after AT&T and MCI are swallowed up by RBOCs serve only approximately 1 percent of commercial buildings with more than 10 voice line-equivalents.

Third, the reduced availability of UNEs that is resulting from the Commission's *Triennial Review Remand Order* ("TRRO") mean that CAPs and CLECs themselves will become more dependent on the availability of ILEC special access in order to meet their customers' needs.[4] Facilities that are in many instances a critical input to the alternative services offered by CAPs and CLECs are now held by their direct competitors—competitors that as the result of the *TRRO* enjoy near complete flexibility in pricing and contract terms for large customers.[5]

Finally, the pricing flexibility that ILECs currently enjoy in connection with their dominant incumbent position allows them to effectively tie purchase of special access in those

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[3] Reply Declaration of Dennis W, Carlton and Hal S. Sider, *In the Matter of SBC Communications Inc. and AT&T Corp. Application for Consent to Transfer of Control*, WC Docket No. 05-65, filed May 10, 2005, at ¶ 31.

[4] The Reply Declaration of Lee Selwyn appended hereto as WilTel Reply Exhibit 7 points out the irony of the RBOCs' change of tune from the TRO Remand proceeding to this docket. In that docket, the RBOCs argued that the reduced availability of UNEs was irrelevant because competitors could rely on special access; here, the RBOCs claim that special access is unnecessary because competitors can use UNEs. Reply Comments of WilTel Communications, LLC, WC Docket No. 05-25, Reply Declaration of Lee L. Selwyn (July 29, 2005) ("*Selwyn WilTel Reply Dec.*"), at ¶¶ 3-4.

[5] The *TRRO* results in facilities that previously were required to be unbundled at TELRIC rates being removed from that requirement on a wire center-by-wire center basis without regard to whether such facilities are available from alternative sources on a building-by-building or route-by-route basis. *TRRO*, at ¶¶ 5, 126, 129, 133, 146, 174. The mere fact that a given wire center has a large number of business lines and several fiber-based collocators does not mean that a given building can be economically served by a competitive carrier without the use of the ILEC's unbundled loops. This is particularly true for buildings where the demand is at the DS-1 level or at the level of a single DS-3.

relatively few locations where alternatives do exist to an embedded base of service that is already locked into long-term arrangements. Given the substantial scale barriers that an entrant must overcome, the lockup of existing demand by incumbent carriers through volume and growth-based discount plans has effectively strangled the threat of commercially viable market entry. ILECs, especially the RBOCs, enjoy increasing demand for special access despite the fact that their rates generally exceed those of access alternatives by 30-100%.[6]

The FCC must acknowledge the reality of ongoing ILEC monopoly and take this opportunity to revise its pricing flexibility rules accordingly. This is especially important in light of the proposed mergers of AT&T with SBC and MCI with Verizon, which threaten to limit further the availability of competitive special access services and otherwise disrupt the special access market.

A. There Are Few Alternatives to BOC Special Access Services

The ILECs assert that the special access market is competitive. USTA argues that "[t]here are many competitors in special access markets today" and that it is "routine" for special access customers "to receive multiple offers to meet service requests."[7] Verizon maintains that "special access competition is robust and the marketplace is working" and goes so far as to claim that "competition exists virtually everywhere that there is significant demand for special access," and that this competition comes from "a multitude of sources, including fiber-based CLECs . . . and inter-modal alternatives such as fixed wireless and cable."[8] SBC asserts that "competitors

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[6] WilTel Reply Exhibit 1.

[7] USTA Comments, WC Docket No. 05-25, at 8 (June 13, 2005).

[8] Verizon Comments, WC Docket No. 05-25, at 38 (June 13, 2005).

have built a myriad of alternative fiber facilities over which competitors are actively serving high-capacity special access customers" and that there is "accelerating" intermodal competition.[9]

1. Carriers and Large Users Are Dependent on ILEC Special Access Services For Nearly All Their Special Access Needs

The ILECs advance these self-serving claims regarding the status of competition to urge further deregulation of their special access offerings.[10] However, their rosy descriptions conflict with the experience of WilTel and other buyers of special access. As discussed in greater detail below, the fact that purchasers do not choose alternative providers evidences the ILECs' continuing market power.

WilTel is a major competitive provider of long-haul voice, video, and data transport services to other carriers, broadcasters, ISPs, CATV companies, and small to mid-size enterprise customers, and the company operates throughout the country. To provide the end-to-end solutions that its customers demand, WilTel depends on ILEC special access services to reach customer premises. Competitive providers simply do not provide a realistic alternative to the ILECs. The most important reason is a question of numbers: WilTel data reveal that CLECs have deployed special access facilities to approximately 25,000 commercial buildings nationwide[11] – less than one percent of all commercial buildings.[12] Moreover, these facilities tend to be concentrated in a small number of markets. Even in the best-case scenario, a national carrier like WilTel could rely on competitors to ILECs for only a small portion of its special

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[9] SBC Comments, WC Docket No. 05-25, at 11; Casto Decl. at ¶¶ 11, 16.

[10] *See, e.g.,* SBC Comments, WC Docket No. 05-25, at 1-13 ("continued regulation . . . is not only unnecessary but also counterproductive").

[11] WilTel Reply Exhibit 2. Even in locations reported by CAPs, WilTel has encountered capacity and service constraints when attempting to use non-ILEC providers. Thus, 25,000 may overstate the actual number of locations of available alternative special access service

[12] *See Selwyn WilTel Reply Dec., at ¶ 14* (citing the RBOCs' *UNE Fact Report*).

access needs. Moreover, the contractual conditions and other obstacles imposed by the ILECs make it difficult for WilTel to use competitive facilities even where they are available. For example, merely to reach the less than 1% of commercial buildings where non-ILEC special access is available, WilTel has computed that 640 separate CAP interconnections would be required.

Dr. Lee Selwyn's Reply Declaration supports WilTel's experience. As Dr. Selwyn notes, the BellSouth's "evidence" regarding competition relies on unsourced data that cannot be verified or replicated and which they use to produce meaningless "measures" of special access market share.[13] Even if BellSouth's data are accepted as correct, they show BellSouth controlling 97.7% of special access tail circuits in its region.[14] Data provided by Verizon suffers from similar shortcomings.[15]

The *UNE Fact Report* relied upon by the RBOCs also misrepresents the actual state of competition in the special access market by improperly aggregating all special access services, circuit types (i.e., transport versus channel terminations), and circuit sizes. For example, the *UNE Fact Report* focuses on the relative wealth of competitive options at the OCn level. While interesting, this focus ignores the fact that by far the largest demand for special access is at the DS-1 and DS-3 level and that, as the Commission has stated, competitors have not meaningfully deployed smaller facilities.[16] By lumping all special access circuits together, the UNE Fact Report thus presents a distorted and misleading view of competition for the smaller special access circuits that are most in demand by carriers and users. Similarly, the UNE Fact Report

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[13] *Selwyn WilTel Reply Dec.*, at ¶¶ 7-9.

[14] *Id.*, at ¶ 9.

[15] *See id.*, at ¶ 11.

[16] *Id.*, at ¶¶ 12-16.

combines transport and loop facilities into a single special access category despite the drastically lower availability of competitive channel terminations.[17]

Other carriers have reported experiences similar to those of WilTel. In 2002 Sprint stated that it "continue[d] to rely upon the ILECs for approximately 93% of its total special access needs."[18] By 2004, Sprint reported that it "relied upon RBOCs for almost 95% of its DS1 circuits."[19] Even in buildings with competitive alternatives, Sprint has found that competitors can provide a connection to just a single customer in 40% of those buildings.[20] Moreover, where a competitor does offer service, it frequently must obtain the "last mile" on a resold basis from the ILEC.[21] As Broadwing observes, "[w]ith relatively few exceptions . . . the ILECs own the *only* last mile link to the target buildings and, therefore, anyone who wants to serve customers in

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[17] *Id.*, at ¶¶ 23-24.

[18] *Performance Measures and Standards for Interstate Special Access,* CC Docket No. 01-321, Comments of Sprint Corporation, at 4 (Jan. 22, 2002).

[19] *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Comments of Sprint Corporation, at 7 (June 13, 2004) ("Sprint Comments"). *See also Selwyn WilTel Reply Dec.*, at ¶ 19 (regarding experience of XO and Xspedius).

[20] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access,* RM Docket No. 10593, Comments of Sprint Corporation, at 4 (Dec. 2, 2002). *See also, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM Docket No. 10593, Comments of the Ad Hoc Telecommunications Users Committee, Attachment A: Lee L. Selwyn, Susan M. Gately, and Helen E. Golding, *Competition in Access Markets: Reality or Illusion, A Proposal for Regulation Uncertain Markets*, prepared for the Ad Hoc Telecommunications User Committee, at 18, n.32 (August 2004) (*"Ad Hoc Users Cmte. Rpt*" or "*ETI White Paper*") (noting AT&T's observation that competitors "are not always able to secure the building owner's permission to locate equipment in the building's common space, so that in many cases access is limited to a 'fiber to the floor' arrangement" such that only particular floors and customers can be served by CLEC facilities."). Sprint Comments, at 6 (commenting that competitors often can serve "only certain floors or individual suites in certain multi-story office buildings.").

[21] Sprint Comments, at 6; Comments of Broadwing Communications, LLC, and Savis Communications Corporation, WC Docket No. 05-25, at 11 (June 13, 2004) ("Broadwing Comments") ("the ILECs still maintain a near monopoly over the tails that connect an ILEC serving wire center to a customer premises").

those buildings must either purchase access from the ILEC or from another carrier reselling the ILEC's services."[22]

Even the largest carrier purchasers of special access – AT&T and MCI – rely on the ILECs. In 2002, AT&T self-supplied just 6,000 of the approximately 186,000 buildings it served.[23] AT&T states that it has relied on ILEC special access over 95% of the time; it self-supplied 3% of its customers and used a competitive alternative for only 2% of its needs.[24] MCI estimates that 90% of its off-net special access circuits are provisioned by ILECs.[25]

End users are subject to the same dependence on the ILECs. The Ad Hoc Telecommunications Users Committee ("Ad Hoc Users Committee"), a group of large corporate and government purchasers of special access, has stated that ILECs "remain the sole source of connectivity at roughly 98% of all business premises."[26] Thus, even the largest corporate users, who arguably have greater bargaining power than carriers, require higher capacity circuits that tend to be somewhat more widely available, and have better access to competitive offerings than smaller users, have little choice but to use the ILECs' special access service.[27]

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[22] Broadwing Comments, at 14. WilTel's experience is consistent with Sprint, Broadwing, and Savvis. Dr. Selwyn's Reply Declaration debunks, in great detail, the RBOCs' claims that competitors frequently provide their own channel termination facilities. Selwyn WilTel Reply Dec., at ¶ 26 (citing examples of AboveNet, LightCore, NEESCom/Gridcom, NEON, and OnFiber).

[23] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM Docket No. 10593, Decl. of Kenneth Thomas, at ¶ 3 (Oct. 15, 2002) ("AT&T Thomas Dec."), at p. 1.

[24] *Id.*

[25] *Performance Measures and Standards for Interstate Special Access,* CC Docket No. 01-321, Comments of WorldCom, Corporation, at 9-10 (Jan. 22, 2002); Broadwing Comments, at 15.

[26] *Ad Hoc Users Cmte. Rpt*, at iv, 12, 16 (August 2004). The report submits that even this figure is probably too low. *Id.*, at 17.

[27] *Ad Hoc Users Cmte. Rpt.*, at 1 (The *Ad Hoc Users Committee* "has on numerous occasions advised the Commission that [the RBOCs'] view of the status of competition – while optimistic and appealing in theory – does not track with reality in the local telecom marketplace, even for purchasers with greater than average buying power.").

In contrast to the ILECs' rhetoric, WilTel and other buyers find it largely impossible to find viable alternatives to ILEC special access services. Few intramodal or intermodal alternatives exist, and most customers rely on BOC special access for all or nearly all of their special access needs.[28] As a result, purchasers are held hostage to the ILECs' inflated prices and onerous contractual terms. If the special access market were, in fact, competitive, the ILECs would not be able to impose such unreasonable terms and prices because customers would choose alternative providers.

Contrary to the BOCs' claim of ubiquitous competition, there is instead nearly ubiquitous dependence upon ILEC-supplied special access. The reality is that competitive wireline alternatives are, at best, confined to a small number of concentrated business districts, a small number of buildings within those districts, and often to individual floors or suites within those buildings. Even where a competitive circuit is available, the last mile is commonly a resold ILEC circuit. This is not competition—this is general monopoly, subject to limited oligopolistic rivalry in a very limited number of locations. As WilTel demonstrates below, the *de minimus* level of rivalry is clearly insufficient to stem the market failure stemming from monopoly pricing and restricted output.

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[28] *See, e.g., Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, Declaration of Susan M. Gately, on behalf of Ad Hoc Telecommunications Users Committee, at ¶¶ 16-19 (June 13, 2005) ("*Gately Declaration*") ("RBOCs remain the sole source of dedicated access connectivity at roughly 98% of all business premises nationwide, even for the largest corporate users.");AT&T Thomas Dec. at ¶ 3; *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking, WC Docket No. 05-25 and RM-10593, at 6 ("Comments of PAETEC Communications, Inc.") (Even in "high-density markets" . . . "PAETEC is dependent on ILECs for 95 percent of its special access lines").

2. Intermodal Competition Does Not Exist

RBOC claims of intermodal competition for special access services are at best farfetched. The Commission has been justifiably dismissive of the existence of intermodal competition for enterprise customers. The Commission has stated that cable modem service is primarily a residential service and that there is "little evidence that cable companies are providing service at DS1 or higher capacities."[29] This observation is consistent with the experiences of carriers and users. The *Ad Hoc Users Committee* has noted that "intermodal providers are not capable of supplying a sufficient quantity or quality of service to represent a serious competitive choice" for large businesses.[30] Cable infrastructure is not available to the "vast majority of office buildings and other business sites."[31] Moreover, the telephony and data products offered by cable systems do not provide the reliability, security, upstream data rates, and other capabilities demanded by business users.[32] In addition, cable's shared platform architecture results in lower transmission speeds and security concerns.[33] Indeed, WilTel has on several occasions approached cable companies with the goal of using them as substitutes for LEC special access. In virtually all cases, the cable firms had failed to develop products for the wholesale market that could be used

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[29] *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 19 FCC Rcd 16783, FCC 04-179, at ¶ 193 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("cable providers are focusing their marketing strategies on residential users and 'small and medium businesses ... that are near the residential network.'"). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Third Report, FCC No. 02-33, 17 FCC Rcd. 2844, *at* ¶ 45 (2002); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Reply Comments of the Ad Hoc Telecommunications Users Committee, at 4-6 (April 22, 2002).

[30] *Ad Hoc Users Cmte. Rpt.*, at 22.

[31] *Id.*

[32] *Triennial Review Remand Order*, at ¶ 193; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Comments of the Ad Hoc Telecommunications Users Committee, at 18 (March 1, 2002).

[33] *Id.*; *Ad Hoc Users Cmte. Rpt.*, at 27.

as substitutes for LEC special access. Moreover, given their numerous priorities related to retail service, WilTel finds little reason to expect that their attitude or interest will drive them toward the special access market in the foreseeable future.

Likewise, fixed wireless is not a substitute for wireline special access. Fixed wireless services are beset by operational problems, including "security and possible performance degradation from interference with other service providers."[34] The Commission's comment that "fixed wireless entry in the enterprise market ... has been limited"[35] is an understatement; today, there are just 25,000 fixed wireless enterprise lines in operation.[36] Even if all of them were special access lines, they would represent less than 0.02% of the special access market. Moreover, as Dr. Selwyn points out, even the *UNE Fact Report* relied upon by the RBOCs in support of their claims regarding fixed wireless makes clear that few, if any, competitive carriers are using fixed wireless in a meaningful way.[37]

In the late 1990's, WilTel itself attempted to extend its network using fixed wireless services from broadband suppliers. WilTel's experience is illustrative of the problems endemic to the use and acceptance of this technology as a substitute for special access. First, obtaining building access from the rooftop for a fixed wireless provider is no less daunting a task than it is for a CLEC attempting to enter the building from the street—in some cases it is more daunting, and more expensive as the service provider must obtain spectrum, rooftop rights, and

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[34] *Id.*, at 23-24.

[35] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand, 18 FCC Rcd 16978, at ¶ 45, n.144 (2003) ("*Triennial Review Order*").

[36] *Id.*

[37] Selwyn WilTel Reply Dec., at ¶¶ 21-22.

connectivity between the rooftop and the data room of the building (often located in the basement where landline access enters the building). As a result, the cost of creating such transmission systems often exceeds landline alternatives. More importantly, reliability, survivability and security of wireless transmission schemes are viewed by customers as second-rate compared to landline alternatives. Thus, even where the wireless service provider discounts its rate below the ILEC price, wireless access is not a substitute for landline special access. As a result of these issues WilTel abandoned its efforts at marketing wireless local access.

WilTel is not the only firm to fail in successfully marketing fixed wireless as a substitute for special access. Advanced Radio Telecom (ART), Teligent, and Winstar, the leading entrants in this space, have all gone through bankruptcy. In the mid-1990s Ameritech attempted to market ART's fixed wireless product, but ultimately abandoned the effort. AT&T at one time promoted the "pizza box" wireless data antenna as an alternative access method. All of these attempts have failed to gain market acceptance and have largely disappeared from the marketplace.[38]

3. The Proposed Mergers of SBC and Verizon with AT&T and MCI Will Further Limit Competition For Special Access Services

The proposed mergers of AT&T with SBC and MCI with Verizon threaten to reduce further the availability of competitive special access services. AT&T and MCI own the country's largest concentrations of competitive access assets both in terms of their density in specific geographic regions as well as their nationwide scope. Between them, they uniquely

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[38] Telephony, COMMUNICATIONS DAILY, April 26, 2001, available at LEXIS, News & Business Library, Telecommunications File (reporting the numerous bankruptcies and near-failures of companies in the Local Multipoint Distribution System ("LMDS") business market, along with the limited growth of Multichannel Multipoint Distribution Service ("MMDS"), in which several large companies invested). See, also J.G. Edwards, LAS VEGAS REVIEW-JOURNAL, AT&T Forces Las Vegas-Area Customers to Find New Phone Company, November 22, 2001, available at LEXIS, News & Business Library, Telecommunications File (reporting that 2800 customers were given 60 days to find new local service as AT&T discontinued fixed wireless service and removed its pizza box-sized equipment from homes.)

provide service to almost one-third of buildings where a potential access alternative exists, and offer service in nearly half of the total buildings where a CAP is present.[39]

MCI is, by far, WilTel's largest competitive supplier of special access. AT&T and MCI also are the largest purchasers of special access.[40] The mergers therefore portend several deleterious effects on the special access market. Most important, carriers and users will almost certainly lose access to the most (and often only) commercially significant competitive providers of special access, at least in the home territories of SBC and Verizon.[41] In addition, the mergers will eliminate the largest non-BOC purchasers of special access, dramatically reducing independent demand for these services. The already significant barriers to entry for the special access market – including obtaining building entry rights, installation and maintenance costs, and regulatory compliance – and the difficulty of recouping the costs of entering and competing in the special access market, make entry difficult even in the densest, most attractive markets.[42] The elimination of AT&T and MCI as independent purchasers of competitive facilities will further reduce the incentive for competitors to build those facilities. In a vicious cycle, this lack of new investment by competitors will make purchasers ever more dependent on the ILECs.

The mergers also threaten to undermine the wholesale market that exists now for special access. AT&T and MCI are among the few carriers not affiliated with an ILEC that qualify for the ILECs' highest volume discounts. As a result, AT&T and MCI qualify for large discounts from the ILECs' inflated special access rates, and resell some of these services to competitive

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[39] WilTel Reply Exhibit 2.

[40] *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* RM-10593, Declaration of Alfred E. Kahn and William E. Talyor on behalf of BellSouth, Qwest, SBC and Verizon, at 23-24 and Table 14, (Dec. 2, 2002).

[41] BT Americas, Inc. Comments, WC Docket No. 05-25, at 8-9; Broadwing Comments, at 20.

[42] BT Americas Comments, at 10.

carriers.[43] There is little reason to think that after acquiring AT&T and MCI, SBC and Verizon will continue this practice;, the result will be an increase to the cost of special access. Experience with previous mergers has demonstrated that the BOCs do not compete in each others' regions, even where required to do so by the Commission.[44] There is no reason to think that they will do so in the special access market.

The mergers will also eliminate whatever downward price pressure AT&T and MCI exert on ILEC special access prices. No other carriers purchase a comparable volume of special access, and only AT&T and MCI could realistically threaten to build their own special access facilities on a scale to compete with the ILECs. The Commission has recognized that high costs, economies of scale, difficulties securing rights of way, and other operational impediments make it unlikely that competitive carriers can replace AT&T and MCI's services.[45] The mergers will thus remove any remaining competitive constraints on the ILECs' actions.

Finally, the approval of all the RBOCs' 271 applications, soon followed by the acquisition of the two largest IXCs by the two largest ILECs, magnifies the importance of reducing special access prices to cost. In 1999, if IXCs overpaid for special access, at least they all overpaid equally, so their competitive success was not predicated on undue access cost

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[43] BT Americas Comments, at 9-10; Broadwing Comments, at 19-20.

[44] The Bell Atlantic-GTE merger, for example, shows that that the BOCs will not compete out-of-region in a meaningful way even when required to do so by merger conditions. *In re Application of GTE Corp. Transferor and Bell Atlantic Corp. For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations,* CC Docket No. 98-184, FCC 00-221, Memorandum Opinion and Order, at ¶ 319 (June 16, 2000) ("the combined firm will spend at least $500 million to provide competitive local service and associated services outside of the Bell Atlantic and GTE legacy service areas."); *See Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999). In neither instance did the BOCs live up to their commitments or their regulatory obligations.

[45] *Triennial Review Remand Order*, at ¶¶ 150-151; Broadwing Comments, at 21.

differentials. However, in a world in which the two largest ILECs own the two largest IXCs, overcharges for special access fundamentally undermine long-haul competition: whether post-merger AT&T overpays SBC for special access is irrelevant to AT&T, because the money comes out of one pocket of the corporate parent's trousers and goes back into the other pocket. For the same reason it is irrelevant if MCI overpays Verizon for special access; the corporate parent recoups the overcharge. But when independent IXCs such as WilTel overpay for special access, the overpayment is a direct subsidy from competitors to the new "SuperBOC," and there is no recoupment. Thus, the failure of the market to drive prices to incremental cost for special access is not only result of a failed effort at making the local market competitive, this failure--absent decisive action by the Commission—will subvert competition in long-distance as well. Allowing ILECs to overcharge for special access will upset the competitive balance in the long-distance market in a way that could not have been anticipated in 1999.

II. SPECIAL ACCESS PRICING REVEALS THAT ILECS MAINTAIN SUBSTANTIAL MARKET POWER

A. WilTel's Examination Reveals that Standard Prices Have Not Fallen Significantly—Despite Lower Prices from CAPs

Conflicting claims have been made regarding whether prices for special access services have increased or decreased during the CALLs regime. Not surprisingly, competitive carriers assert that prices have remained flat or increased, while the ILECs claim that prices have decreased.[46] This dissonance prompted WilTel to perform a thorough examination of pricing data related to its own purchase of special access. WilTel notes that there are numerous pricing

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[46] *See, e.g.*, Joint CLEC Comments, WC Docket No. 05-25, at 10-13. BellSouth acknowledges that its month-to-month prices for DS1 and DS3 special access services have increased and that tariffed rates have gone up 8 to 9 percent. BellSouth Comments, at 14-16. SBC likewise admits that its Phase II basic tariff rates are higher than those in price cap MSAs. SBC Comments, Casto Declaration, at n.49.

plans under which special access can be procured from an ILEC. In WilTel Reply Exhibit 3, WilTel categorizes the numerous special tariffs and contract discount plans under which special access can be purchased, in addition to standard 1, 3, and 5 year tariff pricing. The proliferation of pricing plans does suggest that there are lower prices available than "standard rates." In reviewing the access alternatives offered by CAPs, however, WilTel determined that the terms and conditions under which CAPs offer special access are very similar to those offered under RBOC standard tariff pricing. Therefore, if CAP services were close substitutes and CAP pricing consistently below RBOC pricing, one would expect that absent other market features, there would be heavy demand for CAP services and sharp reductions in demand for RBOC services.

WilTel's examination, as depicted in WilTel Reply Exhibits 4-5, shows that prices for DS-1 and DS-3 special access circuits have remained the same or decreased slightly for interoffice and channel terminations and have increased slightly for stand-alone channel terminations in pricing flexibility areas. More significantly, where pricing flexibility has been granted, special access rates remain far above UNEs, which are based on forward-looking costs.[47] Finally, as depicted in WilTel Reply Exhibit 1, the standard rates for RBOC special access far exceed rates offered to WilTel by CAPs. If there were truly a competitive market for special access, this would not occur. Rather, ILECs would have been forced to reduce their prices toward forward-looking cost to compete, and their standard pricing would match that offered by CAPs. The fact that ILEC prices have not fallen more and remain well above the

[47] The ultimate goal of a market-based approach to regulation is to allow competition to "drive interstate access charges toward the costs of providing these services." Access Reform First Report and Order, 12 FCC Rcd at 16094.

price for alternative services demonstrates that competition under current circumstances is insufficient to generate efficiency-maximizing prices.

Indeed, while the rest of the telecommunications industry has reduced prices in line with greater productivity, the ILECs' sales of special access seem to be largely immune from such forces. To meet competition in the long-haul transport market, since 1999 WilTel has been forced to reduce DS3 prices by over 80%, based on typical WilTel DS3 transport rates in 1999 vs. 2005.[48] Wholesale long distance prices have declined by well over 50% in the industry in general.[49] WilTel has also observed substantial reductions in the rates offered by CAPs.

Many of these price reductions are, no doubt, the result of dramatic reductions in the cost of providing service. Transmission equipment, typically the largest incremental cost of increasing special access capacity, has substantial price decreases since 1999. Based on data provided to WilTel by its vendors, a new OC48 transmission system typically used by a local exchange provider in 1999 that would have cost about $80,000 can now be obtained new for only $35,000, a reduction of more than 50%. In addition, demand has increased significantly, providing for greater transmission density on specific routes and, presumably enabling the use of more cost-effective higher-speed transmission technologies.

Surprisingly, however, despite huge price declines in truly competitive sectors of the telecommunications market and substantial cost declines for transmission equipment, where ILECs have been granted pricing flexibility, prices have not declined substantially. Indeed, in some instances, ILEC prices have increased.[50] WilTel's analysis shows that special access base

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[48] Based on WilTel pricing for a 500-mile long distance DS-3.

[49] Based on a comparison of WilTel wholesale long-distance prices in 1999 and 2005.

[50] WilTel Reply Exhibits 4, 5.

rates for interoffice mileage plus channel termination services have either remained steady or slightly decreased.[51] Absent participation in a revenue commitment plan, therefore, IXCs pay roughly the same amount for a POP-to-End User special access service that they did in 2001, notwithstanding ILEC claims of a vibrantly competitive market, and despite the fact that ILEC competitors do not require substantial revenue commitments. In addition, if the IXC sought a standalone channel termination special access service, it would likely be paying more than it did in 2001.[52] WilTel Reply Exhibit 6 shows that pricing of channel terminations in pricing flexibility areas substantially exceeds price cap pricing for virtually all ILECs and contract terms investigated. This is an amazing result, since pricing flexibility was granted in geographic zones where the density of traffic presumably made the threat of entry and viability of competition the greatest. It would appear that price caps, despite LEC claims regarding their inadequacies, did a far better job of disciplining prices than competition.[53]

WilTel's analysis of RBOC discount plan pricing shows that RBOCs are able to sell successfully despite maintaining rates for most services that substantially exceed those offered by CAPs. Even when compared to RBOC discount plans, CAP pricing to on-net buildings is substantially more favorable than RBOC pricing. WilTel Reply Exhibit 1 shows that, where CAPs have on-net capability and are offering services, their 12-month prices are substantially lower that RBOC 12-month prices. This data further shows that, in many cases, CAP 12-month

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[51] WilTel Reply Exhibits 4, 5.

[52] WilTel Reply Exhibit 5.

[53] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25 and RM-10593, Comments of BellSouth, Attachment 7, Declaration of Harold Furchtgott-Roth and Prof. Jerry Hausman, at 5, 10-11, 24-26 (June 13, 2005).

prices are lower even than the fully discounted 60-month RBOC prices.[54] Even when priced under a 60-month plan with substantial revenue commitments, RBOC service is generally not price-competitive with CAP 12-month pricing for a POP-to-End User service.[55] In a competitive market, where CAP special access acted as a close substitute for ILEC special access, customers would defect to the CAP from the ILEC in droves. That this has not happened underscores both the power of the ILEC discount payment plans in locking up demand for incumbents and the absence of CAP availability to most locations.

B. Evidence from Other Sources Supports WilTel's Empirical Review

Evidence submitted by other commenters supports WilTel's conclusions. T-Mobile compared the prices for special access DS1 channel terminations (based on a 36-month term) and the prices for DS1 UNE loops in Florida, Illinois, New York, Texas, and Washington and found that the BOCs' special access rates were 125.25, 367.97, 160.20, 145.61, and 148.90 percent higher than UNE rates.[56] A comparison of special access and UNE prices for DS1 and DS3 channel mileage revealed similar disparities.[57]

When rates offered by competitors are compared to the BOCs' special access rates the disparities are even more pronounced. T-Mobile compared special access prices to data from benchmark competitive markets to determine whether the special access prices were above or

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[54] WilTel Reply Exhibit 1.

[55] *Id.*

[56] T-Mobile Comments, WC Docket No. 05-25, Declaration of Simon J. Wilkie, ¶ 19, Appendix 2.

[57] T-Mobile concluded that prices for special access DS1 channel terminations in Florida, Illinois, New York, Texas, and Washington are 131.79, 463.35, 238.15, 387.76, and 364.71 percent higher than UNE rates. Prices for special access DS3 channel terminations in the same states were 128.30, 179.76, 210.51, 227.39, and 190.08 percent more than UNE rates. *Id.*